95-1695

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE PEOPLE OF THE STATE OF CALIFORNIA
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,,
Petitioner,

v.

BRET CRAIG BINDA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Fourth Amendment tolerate a double standard for the search or seizure of an operable vehicle depending on whether the search or seizure is based on probable cause to believe the vehicle contains criminal evidence or probable cause to believe the vehicle is a forfeitable asset?

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

THE PEOPLE OF THE STATE OF CALIFORNIA

and

DANIEL E. LUNGREN,

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,,

Petitioner,

v.

BRET CRAIG BINDA, *Respondent*.

OPINION OR JUDGMENT BELOW

Petitioner respectfully petitions for a writ of certiorari to review the order of the California Court of Appeal, Fifth Appellate District, affirming the trial court judgment of dismissal of criminal charges against Bret Craig Binda, defendant and respondent (hereinafter "defendant"), for transportation and possession of methamphetamine following defendant's successful motion to suppress evidence. (See Appendix, item 1.) The decision, which was unpublished, was designated case number F021529 by the Court of Appeal. Defendant was originally charged in information number 263845 of the Superior Court of Stanislaus County, California.

STATEMENT OF JURISDICTION

This Court has jurisdiction under section 1257, subdivision (a), of Title 28 of the United States Code and Rule 10 of the Rules of the Supreme Court of the United States.

The opinion by the Fifth Appellate District of the California Court of Appeal concerning which a writ of certiorari is sought by petitioner was filed on September 28, 1995. A modification of this opinion was filed on October 25, 1995.

The California Supreme Court denied a petition for review on December 21, 1995.

In a letter dated March 20, 1996, referencing Application No. A-781, Assistant Clerk Melissa A. Blalock informed petitioner that the Honorable Justice Sandra Day O'Connor had granted an extension of time within which to file a petition for a writ of certiorari in this matter to and including April 19, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

The Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On December 21, 1992, officers of the Modesto, California, Police Department seized a van being driven on a public street by defendant because they had probable cause to believe the van was a forfeitable asset in that it was the fruit of narcotics transactions. The officers lacked a warrant. The sufficiency of the probable cause was not questioned at any stage of the

subsequent proceedings. Methamphetamine was found inside the van during an inventory search.

Defendant was charged with violation of California Penal Code sections 11377 and 11379, possession and transportation of methamphetamine respectively.

After a hearing, the trial court granted defendant's motion to suppress evidence (Cal. Pen. Code, § 1538.5) based on the claim that the van was improperly seized. Defendant's argument included the contention that the seizure violated the Fourth Amendment. See Appendix No. 1, slip opinion of Court of Appeal, p. 7, last 2 sentences. The trial court thereupon ordered the matter dismissed for insufficient evidence on March 3, 1994, pursuant to California Penal Code section 995.

Petitioner sought relief in an appeal filed with the California Court of Appeal, Fifth Appellate District. The constitutionality of the seizure was fully addressed by both parties in the briefing before the Court of Appeal.

In an unpublished opinion filed on September 28, 1995, the Court of Appeal denied the appeal and affirmed the judgment below. A modification was filed to the opinion on October 25, 1995, in response to the People's Petition for Rehearing.[1/]

The decision by the Court of Appeal addressed and was based upon the federal constitutional question; the court first rejected a theory proposed by petitioner to the effect that state law permitted the seizure, found that there were no exigent circumstances present when the van was stopped, and adopted the reasoning and

---

1. The thrust of the modification was to delete all language pertaining to a possible alternate theory justifying suppression, namely that the asset forfeiture theory was a pretext masking an intent to search for criminal evidence.

holding of *United States* v. *McCormick*, 502 F.2d 281 (9th Cir. 1974).[2] The finding regarding the absence of exigent circumstances was based on evidence that the officers had been aware of the facts supporting probable cause for three months before the van was seized.

The California Supreme Court denied petitioner's Petition for Review on December 21, 1995. This petition follows.

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2. Under California law, motions to suppress evidence may only be based on a claim that the search and/or seizure violated the Federal Constitution. *In re Lance W.*, 37 Cal.3d 873, 882, 886-887 (1985). This Court has acknowledged this rule and implicitly approved its implications. *California* v. *Greenwood*, 486 U.S. 325, 337-338 (1988). The rule holds even where evidence has been seized by officers who act in excess of their authority and in violation of state law, so long as the defendant's rights under the Fourth Amendment of the federal Constitution are not violated. *People* v. *Franco*, 183 Cal.App.3d 1089, 1095 (1986); *People* v. *Alvarado*, 181 Cal.App.3d Supp. 1, 5 (1986); *People* v. *Neer*, 177 Cal.App.3d 991, 997-999 (1986).

California voters, in short, have rejected use of the exclusionary rule as a remedy for official "misconduct" unless compelled by the federal Constitution.

Thus the finding by the Court of Appeal that the officers' conduct was not authorized by state law may not be the basis of a suppression order; the only question is whether the officers' conduct violated the Fourth Amendment. The Court of Appeal properly, and necessarily, reached this question, but resolved it incorrectly.

It should be noted that this case does <u>not</u> involve the question of whether the state may lawfully take permanent possession of a vehicle seized in violation of state law, but only whether evidence found therein is admissible.

ARGUMENT

A SINGLE FOURTH AMENDMENT STANDARD MUST APPLY TO THE WARRANTLESS SEIZURE OF AN OPERABLE VEHICLE REGARDLESS OF WHETHER THE VEHICLE IS SEIZED TO SEARCH FOR CRIMINAL EVIDENCE OR AS A FORFEITABLE ASSET

INTRODUCTION

Where police have probable cause to search an operable motor vehicle for criminal evidence, no showing of exigency is required to justify a warrantless search. A split has emerged among the federal courts of appeals, however, over whether a specific showing of exigency is required before the warrant requirement will be excused where police have probable cause to seize the vehicle as a forfeitable asset.

Petitioner submits that this case presents in unusually pristine form the question of whether the federal Constitution is disturbed where officers, without exigent circumstances, make a warrantless seizure of an operable vehicle on probable cause to believe the vehicle is a forfeitable asset. While the Ninth and Second circuits have so held, eight others have taken a contrary position. State Courts are similarly divided.

Petitioner submits that this irreconcilable split has existed for more than 20 years, is ripe for resolution, and involves a fundamental question of constitutional doctrine which is compelling.

DISCUSSION

A series of cases by this Court has established that no showing of exigent circumstances need be made where officers search an operable vehicle without a warrant based on probable cause to believe that criminal evidence may be found in the vehicle. See, e.g., *California* v. *Carney*, 471 U.S. 386, 392 (1985) [motor home on public parking lot]; *Florida* v. *Meyers*, 466 U.S. 380, 381, 383 (1984) [impounded vehicle]; *Michigan* v. *Thomas*, 458 U.S. 259 (1982) [impounded vehicle]; *United States* v. *Ross*, 456 U.S. 798 (1982) [closed compartment of impounded vehicle]; *Texas* v. *White*, 423 U.S. 67 (1975) [impounded vehicle]; *Chambers* v. *Maroney*, 399 U.S. 42 (1970) [impounded vehicle]; these cases will be hereinafter referred to as the *Carney-Ross* line.

While the multiplicity of cases in this line demonstrates that this doctrine is well established, it also demonstrates that this Court has perceived an ongoing uncertainty about the application of the Fourth Amendment to warrantless searches and seizures of automobiles. The split among the circuits on the question presented by this petition demonstrates that that uncertainty is not yet completely resolved; petitioner submits that resolution by this Court is required.

The Ninth Circuit, like all circuits, has embraced the *Carney-Ross* doctrine. *United States* v. *Hatley*, 15 F.3d 856, 858-859 (9th Cir. 1994); *United States* v. *Hamilton*, 792 F.2d 837, 842-843 (9th Cir. 1986).

Where there is a seizure of a forfeitable asset, as distinguished from a seizure for purposes of a search for criminal evidence, this Court has held that Fourth Amendment protections and a probable cause test are

applicable. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965)[3]; see also *United States* v. *One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989); *United States* v. *Seifuddin*, 820 F.2d 1074, 1077 (9th Cir. 1987); see also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977); *Murray's Lessee* v. *Hoboken Land & Improv. Co.*, 18 How 272, 15 L.Ed. 372 (1856).

It would follow, therefore, that where the same constitutional protection is involved, the same standard of exigency (or lack thereof) should apply. Thus where there is to be a seizure of an operable vehicle as a forfeitable asset, no further showing of exigency need be made and the only question on review is the sufficiency of the probable cause to believe that the vehicle is actually subject to forfeiture.

However, notwithstanding the *Carney-Ross* line of cases, a split has arisen among the federal circuit courts as to the nature of the exigency which must be shown. The majority of the circuits have adopted the *Carney-Ross* test -- that the exigency requirement is satisfied once officers determine that the item to be seized for asset forfeiture purposes is an operable motor vehicle. The strongest recent case in this line is probably *United States* v. *Pace*, 898 F.2d 1218, 1241 (7th Cir. 1990). The Seventh Circuit has been joined by the First,

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3. The facts of *1958 Plymouth* somewhat parallel those of this petition. A low-riding vehicle suspected of containing unlicensed liquor was stopped by officers of the state Liquor Control Board acting on probable cause without a warrant. A proceeding was initiated to forfeit the car based on the discovery of the unlicensed liquor. The lower courts rejected the claim of the vehicle's owner that the exclusionary rule must be applied appropriate to evidence supporting probable cause. This Court held that the Fourth Amendment applied to the seizure and that the exclusionary rule could be applied, and remanded for consideration of the sufficiency of the probable cause.

Third, Fourth, Fifth, Eighth, Tenth, and Eleventh circuits, a total of eight circuits. Representative cases from those circuits, identified in numerical order of the circuits, are *One 1975 Pontiac LeMans*, 621 F.2d 444, 450 (1st Cir. 1980)[4], *United States* v. *One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3d Cir. 1984); *United States* v. *$29,000--U.S. Currency*, 745 F.2d 853, 856 (4th Cir. 1984); *United States* v. *One 1978 Mercedes Benz*, 711 F.2d 1297, 1302 (5th Cir. 1983); *O'Reilly v. United States*, 486 F.2d 208 (8th Cir. 1973); *United States* v. *Stout*, 434 F.2d 1264 (10th Cir. 1970); *United States* v. *Valdes*, 876 F.2d 1554, 1558-60 (11th Cir. 1989).[5]

"It is difficult to ignore this general acceptance," the *Pace* court noted. *United States* v. *Pace, supra,* 898 F.2d at p. 1242; see also 3 Wayne R. LaFave, *Search and Seizure*, § 7.3(b), at p. 83 (2d ed. 1987).

An alternate line has developed in the Ninth and Second Circuits, however, which imposes a higher standard of exigency -- not only must the People show that the item to be seized is an operable vehicle, but they must make some further showing of exigency to the effect that the vehicle is likely to disappear or be concealed if officers delay the seizure to obtain a warrant. The seminal case in this line is *United States* v. *McCormick*, 502 F.2d 281, 285-287 (9th Cir. 1974). *McCormick* was followed in order in the Ninth Circuit by

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4. The First Circuit's position may be clouded. See *U.S.* v. *Pace, supra,* 898 F.2d at p. 1241, fn. 10.

5. Petitioner is aware of no cases addressing this question in the Sixth, Seventh, or Ninth circuits.

United States v. *Karp*, 508 F.2d 1222 (9th Cir. 1974)[6]; *United States* v. *Spetz*, 721 F.2d 1457, 1471 (9th Cir. 1983); and *United States* v. *Linn*, 880 F.2d 209, 215 (9th Cir. 1989).

The Second Circuit joined the Ninth in the strident language of *United States* v. *Lasanta*, 978 F.2d 1300 (2d Cir. 1992), a case which fails to acknowledge that it departs from well-established precedent in that circuit. See *United States* v. *Francolino*, 367 F.2d 1013 (2d Cir. 1966). *Lasanta* was recently followed by *United States* v. *Daccarett*, 6 F.3d 37, 49 (2d Cir. 1993).

The same split may be found in the state courts. See generally the discussion in *State* v. *Brickhouse*, 890 P.2d 353, 360-364 (Kan.App. 1995). Some, like *Brickhouse*, are in accord with *Pace* and do not require exigent circumstances. See, e.g., *State* v. *McFadden*, 63 Wash.App. 441, 449, 820 P.2d 53 (1991). Others, by various avenues of reasoning, are in accord with *McCormick*. See, e.g., *Davis* v. *State*, 813 P.2d 1178, 1181-1184 (Utah 1991); *State* v. *Peacher*, 167 W.V. 566, 280 S.E.2d 559, 576-579 (1981) [exigent circumstances sufficient]; *Fuqua* v. *Armor*, 543 S.W.2d 64 (Tenn. 1976) [absence of exigent circumstances invalidated seizure]; *State Conservation Dept.* v. *Seaman*, 396 Mich. 299, 321, 240 N.W.2d 206, 213, 216 (1976) [same; moored fishing boat]; *In Re 1972 Porsche*, 307 So.2d 451 (Fla.App.1975) [seizure invalidated; exigent circumstances and probable cause both lacking].

There exists, therefore, a well-established split among the circuits and states on this question. Petitioner submits there is a compelling need for uniform

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6. *Karp* expressly acknowledged that the court has established a new rule departing from precedent in other circuits, identifying several cases with which it was in disagreement. *Id.*, at p. 1125.

application of fundamental constitutional doctrine in this area.

Petitioner submits that there can be only one Fourth Amendment standard for a search or seizure based on probable cause, and there can accordingly be only one standard for the showing of exigency required to excuse the general warrant requirement. It defies reason to hold that there can coexist two Fourth Amendment constitutional standards, one applicable to probable cause vehicle seizures and searches for criminal evidence and one applicable to probable cause seizures of a vehicle which is a forfeitable asset.

Nonetheless the two lines have gone their separate ways; when an opportunity came for them to join, in fact, the Ninth Circuit took a wrong turn, as demonstrated by this quotation from *United States* v. *Spetz, supra*, 721 F.2d 1457, written after *Ross* was filed:

> "Although automobiles are inherently mobile, '[t]he word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.' *Coolidge* v. *New Hampshire*, 403 U.S. [443] at 471-62, 91 S.Ct. at 2035 [1971]. The existence of probable cause standing alone is not sufficient to justify a warrantless search or seizure of an automobile. A warrantless search or seizure is permissible only if probable cause exists *and* the facts or circumstances surrounding the particular search of an automobile are sufficient to bring that search within the automobile exception. It is an understatement to observe that the contours of the automobile exception are not clearly defined. [Footnote omitted.] In fact, we have previously noted the impossibility of reconciling the Supreme Court's decisions in this area. *United States* v. *McClain*, 531 F.2d 431, 433 (9th Cir., *cert. denied,*

> 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976)." *United States* v. *Spetz, supra,* 721 F.2d at p. 1471, emphasis in original.[7]

The reasons for this uncertainty by the Ninth Circuit appear to be historical. The emergence of the *Carney-Ross* line caused lower courts to reconsider their positions on searches of vehicles for criminal evidence. There had already been in place, however, a venerable line permitting forfeiture seizures of vehicles which began when the Supreme Court authorized the warrantless seizure of bootleggers' vehicles based on probable cause:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause . . . [to believe] that an automobile or other vehicle contains that which by law is subject to seizure and destruction [alcoholic beverages], the search and seizure are valid." *Carroll* v. *United States*, 267 U.S. 132, 149 (1925).

However, as noted in *California* v. *Carney, supra,* 471 U.S. at pp. 390-391, the mobility of an automobile was "clearly the basis of the holding in *Carroll*" and some subsequent cases supporting the automobile exception appeared to hold that if there were no specific exigent circumstances associated with the automobile a warrant may be required.

Thus, in *Chambers* v. *Maroney, supra,* 399 U.S. 42, this language may be found:

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7. In fairness to the authors of *Spetz,* others have acknowledged that automobile searches have been "a troubled area." See Concurring opinion by Blackmun, J., *United States* v. *Ross, supra,* 456 U.S. at p. 825.

> "Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstances the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search. [footnote citing *Chimel* v. *California* 395 U.S. 752, 794 n. 9 (1969)]." (*Chambers* v. *Maroney, supra,* 399 U.S. at pp. 50-51.)[8]

It subsequently came to be recognized, however, that the automobile exception was supported not only by the mobility of a vehicle but the fact that one's expectation of privacy in a vehicle is "significantly less" than that in a home or office. *California* v. *Carney, supra,* 471 U.S. at p. 391, principally citing *South Dakota* v. *Opperman*, 428 U.S. 364, 367, and *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

As expressed by this Court:

> "In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of

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8. In *Chambers*, the court affirmed the warrantless search of a vehicle taken to the station house after its occupants had been arrested for robbery because a field search would have been "impractical." *Chambers* v. *Maroney, supra,* 399 U.S. at p. 52, n. 10.

> privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." *California* v. *Carney, supra,* 471 U.S. at p. 391.

Thus the *Carney-Ross* line effectively extinguished the possibility that a warrant might be required before an operable vehicle could be subject to a probable cause search for criminal evidence.

Petitioner submits that this Court must do the same for the probable cause seizure of an operable vehicle which is a forfeitable asset.

CONCLUSION

An irreconcilable conflict exists among the federal courts of appeal and many state courts on an issue of fundamental constitutional law. Petitioner respectfully submits that this Court must resolve the conflict by holding that no showing of exigency is required where an operable vehicle is seized without a warrant on probable cause to believe that it is a forfeitable asset.

Dated: April 16, 1996.

Respectfully submitted,

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BRET CRAIG BINDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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FIFTH APPELLATE DISTRICT

APPENDIX

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

BRET CRAIG BINDA,

Defendant and Respondent

NO. F021529

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County, Hugh Rose III, Judge. [Superior Court No. 263845]

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Margaret Garnand Venturi and Alan Ashby, Deputy Attorneys General, for Plaintiff and Appellant.

Riordan & Rosenthal and Harold J. Rosenthal for Defendant and Respondent.

* * * *

STATEMENT OF THE CASE

On December 16, 1993, an information was filed in Stanislaus County Superior Court charging respondent Bret Craig Binda with count I, transportation of methamphetamine (Health & Saf. Code, § 11379), and count II, possession of methamphetamine (Health and Saf. Code, § 11377). Respondent was arraigned and pleaded not guilty.

On February 15, 1994, respondent filed a motion to suppress evidence pursuant to Penal Code section 1538.5, and a motion to dismiss the information pursuant to section 995. On February 22, 1994, the prosecution filed opposition to both motions.

On March 3, 1994, a hearing was held on respondent's motions. The court granted the suppression motion and ordered the matter dismissed.

On May 2, 1994, the People filed a timely notice of appeal.

STATEMENT OF FACTS

The following facts surrounding the disputed seizure and search were adduced at the preliminary hearing.

On December 21, 1992, Sergeant Ken Reid was supervising the tactical patrol unit for the Modesto Police Department. The unit was looking for Tommy McClelland, a fugitive believed to be at a particular residential address. McClelland was wanted for possession for sale of five pounds of methamphetamine. Sergeant Reid observed a vehicle which he believed belonged to McClelland parked in front of the address. Reid also observed one Billy

Sowders and respondent Binda with two of Binda's vehicles which were parked in front of the address: a white Blazer and a blue Astro van. Reid had information that Binda was a close associate of McClelland and possibly the source of McClelland's narcotics. Sowders was working underneath the Blazer. A few minutes later, Sowders drove off in the Blazer, which officers subsequently stopped and seized.

At approximately 9:15 p.m., Sergeant Reid ordered a traffic stop of the Astro van and discovered that respondent Binda was the driver. The van was stopped on Santa Cruz and Monterey Streets just after it drove away from the residence. Sergeant Reid testified that the only reason to stop the Astro van was to seize it for asset forfeiture purposes. Reid had information from two reliable confidential informants that respondent Binda purchased the Astro van with proceeds from the distribution and/or manufacture of

methamphetamine. Binda and the passenger were removed from the vehicle. As part of the forfeiture process, Reid instructed other officers to conduct an inventory search of the Astro van. in the course of the inventory search, the officers found a small black metal box which contained two baggies of a white powdery substance. The baggies contained 1.21 grams and .01 grams of methamphetamine.

Reid did not have a warrant to detain the Astro van. Reid testified that when he ordered the stop he did not have any specific information that there were narcotics in the Astro van, or that it was being used as an instrumentality for narcotics sales or for other criminal purposes. Reid had never previously seized narcotics from the Astro van. Reid testified that the only reason for stopping the Astro van was that he had probable cause to believe it was purchased with narcotics proceeds, based on the information from his

confidential informants, and it was subject to asset forfeiture.

There was other evidence at the preliminary hearing about Reid's investigation of a motorcycle gang, a search warrant for another residence suspected of being used for the manufacture of methamphetamine, and respondent Binda's involvement with the gang. Reid had developed this information three months before the instant seizure and had seen Binda driving the Astro van around town but had never stopped it. The prosecution agreed, however, to withdraw all evidence concerning the search warrant and other possible criminal activity, and limited the justification for Reid's traffic stop to probable cause to believe the Astro van was subject to asset forfeiture because it had been purchased with narcotics proceeds. There is nothing in the record to indicate that forfeiture proceedings were actually initiated. Instead,

respondent was charged with possession and transportation of methamphetamine based on the narcotics found during the inventory search of the van after it was seized for asset forfeiture. [See paragraph 1 of modification.]

Respondent Binda filed a motion to suppress the methamphetamine discovered during the inventory search of the Astro van. Respondent argued that the civil forfeiture statute, Health and Safety Code section 11471, did not justify the seizure of his vehicle. Respondent argued that section 11471 required a warrant prior to effecting an asset forfeiture, and none of the specified exceptions applied. Respondent also argued that seizure of the van without a warrant violated the Fourth Amendment, and there was no exigency excusing the lack of a warrant. Respondent pointed to Ninth Circuit cases which prohibit such a seizure without a warrant.

In opposition, the prosecution argued that section 11471, subdivision (d) permitted seizure of an asset subject to forfeiture without a warrant if there was probable cause to believe the property was used in violation of the Uniform Controlled Substances Act. The prosecution claimed that violations of the act were not limited to criminal offenses, but also included section 11470, subdivision (f) of the act, which makes property traceable to a controlled substance exchange subject to forfeiture. The prosecution acknowledged that Ninth Circuit cases prohibit such a seizure, but argued the superior court to disregard such authority and adopt contrary rulings by other federal circuits. The prosecution also argued that the inventory of the vehicle was proper and separate from the seizure, and the fruits of the valid inventory search should not be suppressed.

On March 3, 1994, a hearing was held on respondent's suppression motion. The court noted with respect to the Astro van, "you don't have the van disappearing into the dark. You don't have the van going down I-5." The court found there were no exigencies permitting a warrantless seizure of the van, granted the suppression motion, and ordered the dismissal of the criminal charges against respondent.

The People have filed an appeal of the grant of the suppression motion. They argue that the seizure of the Astro van was valid because the officer had probable cause to believe the vehicle was subject to forfeiture and the mobility of the vehicle created an exigence. Respondent Binda contends that an asset forfeiture seizure must still satisfy the Fourth Amendment, and there was no exigency to justify the warrantless seizure of the vehicle.

DISCUSSION

THE VAN WAS IMPROPERLY SEIZED

The Attorney General contends that the Astro van was subject to seizure pursuant to the asset forfeiture statute (Health and Saf. Code, § 11471) and that a warrantless seizure is permitted under the majority of federal circuit authorities and the Fourth Amendment. While no civil forfeiture action was actually filed over the van, the People contend the asset forfeiture statute justifies the warrantless seizure of the van because the officer had probable cause to believe the van had been purchased with narcotics proceeds. [See paragraph 2 of modification.]

A. Statutory Authority

Division 10 of the Health and Safety Code is the Uniform Controlled Substances Act, which proscribes the manufacture, sale, distribution, transportation etc. of controlled substances. Chapter 8 (Health and Saf.

Code, §§ 11469-11495) sets forth detailed procedures for the seizure and forfeiture of specified property traceable to unlawful drug transactions. Section 11469 states the principle objective of forfeiture is law enforcement, and civil forfeiture "is intended to be remedial by removing the tools and profits from those engaged in the illicit drug trade, . . ." (§11469, subds. (a) & (j).) Section 11470 lists property subject to forfeiture, including all controlled substances manufactured or distributed "in violation of this division" (§ 11470, subd. (a)); all raw materials intended for use in manufacturing any controlled substance "in violation of this division" (§ 11470, subd. (b)); all books, records, and research products used "in violation of this division" (§ 11470, subd. (d)); and the interest of a registered owner of a vehicle used as an instrument to facilitate the possession for sale of specified types of narcotics (§ 11470, subd. (e)). The

references to "this division" are to Division 10, the Uniform Controlled Substances Act.

Section 11470, subdivision (f) states that "[a]ll moneys negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance," and "all proceeds traceable to such an exchange" are subject to forfeiture. In addition, all moneys, negotiable instruments, or securities used or intended to be used to facilitate the violation of specified statutes insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or conspiracy to commit such an offense, are subject to forfeiture if the exchange, violation, or other conduct occurred within five years of the seizure of the property.

In the instant case, the prosecution stipulated that the only basis for Officer Reid's decision to seize the van was information from two reliable confidential

informants that respondent purchased the van with narcotics proceeds. The prosecution stipulated that there was no criminal basis for the seizure other than the traceable assets theory. Thus, section 11470, subdivision (f) would have provided the only statutory basis for forfeiture of the van as a proceed "traceable" to a narcotics exchange.

Section 11471 states that property subject to forfeiture may be seized by an officer upon process issued by any court. Seizure without process may be made only under specified circumstances: (a) the seizure is incident to an arrest or search under a search warrant; (b) the property has been the subject of a prior judgment in favor of the state; (c) there is probable cause to believe the property is directly or indirectly dangerous to health and safety; or (d) there is probable cause to believe "the property was used or is intended to be used in violation of this division,"

again referring to the Uniform Controlled Substances Act. (§11471, emphasis added.)

The People concede that the only possible basis for the warrantless seizure of the van was section 11471, subdivision (d). They argue that Officer Reid was entitled to seize the van without a warrant because he had probable cause to believe the van was used or intended to be used in violation of the Uniform Controlled Substances Act. They argue that the purchase of the van with narcotics proceeds constitutes the use of property "in violation" of the Uniform Controlled Substances Act, and that such "violations" need not be criminal offenses to trigger the forfeiture proceedings and permit a warrantless seizure.

The People's interpretation of section 11471 is extremely broad and inconsistent with the plain language of the statute. The civil forfeiture prescribed by the Health and Safety code is a remedial act which

transfers title to the state. (Baca v. Minier (1991) 229 Cal.App.3d 1253, 1262.) The fact that property is subject to forfeiture under section 11470 does not necessarily mean that a "violation" of the Uniform Controlled Substances Act has occurred. While section 11470 lists several "violations" of the act which make the property subject to forfeiture, such violations do not apply to the instant case. It is undisputed that the only basis for forfeiture was the officer's belief that the van had been purchased with narcotics proceeds. Thus, if a civil forfeiture proceeding had been initiated, it would have been pursuant to the clause in section 11470, subdivision (f) providing for forfeiture when property is "traceable" to narcotics sales. [See paragraph 3 of modification.] The "traceable assets" forfeiture provision is not a "violation" of the Uniform Controlled Substances Act, but instead a remedial tool to remove the profits from the narcotics trade. Thus,

while Officer Reid may have had probable cause to believe respondent's van was purchased with proceeds traceable to narcotics transactions, such a belief would have justified the initiation of civil forfeiture proceedings; it did not permit the warrantless seizure of respondent's van under section 11471, subdivision (d) because Reid did not have probable cause to belief [*sic*] the van had been used "in violation" of the act. [See paragraph 4 of modification.]

B. The Warrant Requirement and Exigencies

The People contend that even if the seizure was not authorized by section 11471, subdivision (d), the evidence is still admissible because the seizure did not violate the federal Constitution. The People concede that the Ninth Circuit has held that the warrant requirement applies to forfeiture seizures, but they point to the "great weight of federal authority" which upholds "the proposition that probable cause alone will

support the seizure of property subject to forfeiture without the need to obtain a warrant and without exigent circumstances," and urges this court to follow the other circuits.

In support of their argument, the People rely on a line of federal cases summarized in United States v. Pace (7th Cir. 1990) 898 F.2d 1218. Officers seized the defendants' cars pursuant to the Illinois and federal forfeiture statutes because they believed that defendants used the vehicles to drive to a residence and arrange a cocaine deal. The relevant state forfeiture statute provided for the seizure of any vehicle used in committing a violation of the Illinois Controlled Substance Act. Defendant argued that even if the statute permitted warrantless seizure, the Fourth Amendment did not. Pace rejected this argument: "The weight of authority

. . . holds that police may seize a car without a warrant pursuant to a forfeiture statute if they have probable cause to believe that the car is subject to forfeiture." (Id. at p. 1241.)

> "We agree with he majority approach. The federal courts' overwhelming approval of warrantless forfeiture seizures based on probable cause, along with the historical acceptance of the constitutionality of such searches, are evidence that such searches have been generally accepted as reasonable. [Citation.] It is difficult to ignore this general acceptance. Furthermore, under a civil forfeiture statute, 'the vehicle . . . is treated as being itself guilty of wrongdoing.' [Citation.] Thus, seizing a car from a public place based on probable cause is analogous to arresting a person outside the home based on probable cause. Such an arrest, even without a warrant, does not violate the Fourth Amendment, although it is possibly a more significant intrusion on privacy interests than seizing an unoccupied car. [Citations.]" (United States v. Pace. supra, 898 F.2d at p. 1241.)

In reaching its holding, Pace relied on forfeiture cases from other federal courts. (Id. at p. 1241, see also United States v. One 1977 Lincoln Mark V Coupe (3d Cir. 1981) 643 F.2d 154, 158 (only need probable cause, not a warrant, because property subject to

forfeiture is contraband); United States v. One 1978 Mercedes Benz (5th Cir. 1983) 711 F.2d 1297, 1302 (warrantless seizure of automobile pursuant to 21 U.S.C. § 881, subd. (b)(4) does not offend Fourth Amendment); United States v. Valdes (11th Cir. 1989) 876 F.2d 1554, 1557 (warrantless seizure of automobiles used to facilitate drug transaction did not violate Fourth Amendment).) In these cases, however, property was sized pursuant to the federal forfeiture statute, which expressly permits warrantless seizure of property as long as the Attorney General has probable cause to believe that the property is subject to forfeiture pursuant to the statute. (See United States v. Valdes, supra, 876 F.2d 1554, 1557; 21 U.S.C. § 881, subd. (b)(4).)

Pace also relied on G.M. Leasing Corp. v. United States (1977) 429 U.S. 338, 351-352. In that case, Internal Revenue Service agents seized cars subject to

tax liens without a warrant. The court held that the seizures did not violate the Fourth Amendment; the agents had probable cause to believe the cars were subject to seizure, and the seizures took place on public streets, parking lots, or other open places. The seizures, however, occurred after the filing of notices of tax liens and were conducted in partial satisfaction of tax assessments.

The Ninth Circuit has held that the warrantless requirement applies to seizures pursuant to statutory forfeiture schemes. (United States v. McCormick (9th Cir. 1974) 502 F.2d 281, 285-287; United States v. Spetz (9th Cir. 1983) 721 F.2d 1457, 1469-1470; United States v. Linn (9th cir. 1989) 880 F.2d 209, 215.) In Linn, agents seized defendant's vehicle based on the probable cause belief that defendant transported money in it to purchase drugs. The federal forfeiture statute requires forfeiture of any property used, or

intended to be used, in any manner or part, to commit, or to facilitate the commission of, a drug related felony (21 U.S.C. § 853); forfeiture is also required for any conveyance used in any manner to facilitate the sale of controlled substances (21 U.S.C. § 881, subdivision (a)(4)). Linn held that the warrant requirement applies to forfeiture seizures even if authorized by statute, but that exigent circumstances excused the absence of a warrant because defendant was headed toward Canada and his mobility reinforced the agents' need to act quickly. "This forfeiture seizure is technically not a Ross 'automobile exception' case, because there was no probable cause to search for contraband (although the automobile was, in essence, itself the 'contraband'). [Citation.] However, the 'mobility' underpinning of the automobile exception is, of course, closely related to our 'exigent circumstances'

analysis, and is the compelling factor." (United States v. Linn, supra, 880 F.2d at p. 215.)

The Second circuit has also applied the warrant requirement to statutory forfeiture seizures. In United States v. Lasanta (2nd Cir. 1992) 978 F.2d 1300, federal agents seized defendant's vehicle without a warrant pursuant to 21 U.S.C. section 881, subdivision (b)(4), which permits the Attorney General to seize "[a]ny property subject to forfeiture" without process when he "has probable cause to believe that the property has been sued or is intended to be used in violation of this subchapter." The agents claimed they had probable cause to believe defendant's vehicle was used to transport or facilitate the transportation of controlled substances pursuant to 21 U.S.C. section 881, subdivision (a). The government argued that the plain language of the statue eliminated any responsibility to obtain a warrant in executing asset

forfeiture seizures, and the statute represented Congress's decision to create a new exception to the Fourth Amendment. "In essence, it argues that congress has amended the constitution. to state the position is to refute it, because congress cannot authorize by legislation what the constitution forbids." (Id. at p. 1304.) Lasanta acknowledged the Pace line of cases, but held that such a warrantless seizure must still meet an exception to the Fourth Amendment.

> "We find no language in the fourth amendment suggesting that the right of the people to be secure in their 'persons, houses, papers and effects' applies to all searches and seizures except civil-forfeiture seizure in drug cases. U.S. Const., amend. IV. We reject out of hand the government's argument that congress can conclusively determine the reasonableness of these warrantless seizures, and thereby eliminate the judiciary's role in that task of constitutional construction. See U.S. Const. art VI, cl. 2. While congress may have intended civil forfeiture to be a 'powerful weapon in the war on drugs,' [citation], it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty." (978 F.2d at p. 1305.)

Lasanta found no exigent circumstances to justify the warrantless seizure, and the subsequent inventory search was invalid. (See also United States v. Daccarett (2nd Cir. 1993) 6 F.3d 37, 48-49 (warrant requirement applies to seizures pursuant to 21 U.S.C. § 881, subd. (b)(4).)

The People raise several arguments based on the federal cases. First, they argue that a seizure pursuant to the state forfeiture statute is not subject to the warrant requirement. Second, they argue that even if the instant seizure was not authorized pursuant to Health and Safety Code section 11471, subdivision (d), the evidence should not be suppressed because the Pace line permits a warrantless seizure of property subject to forfeiture and exigent circumstances existed. Third, they urge this court to follow the "weight" of federal authority cited in Pace, and reject the Ninth Circuit cases which require satisfaction of the warrant

requirement. The People argue that this court is not obliged to give special deference to the position of the Ninth Circuit simply because of "California's accidental placement within that circuit."

The People's argument must be rejected. First, while the Pace line excuses compliance with the warrant requirement for forfeiture seizures, the cases also involve seizures which are within the particular statutory scheme. The federal forfeiture statute specifically permits a warrantless seizure if there is probable case to believe the property is "subject to forfeiture" pursuant to the statute. (See 21 U.S.C. § 881, subd. (b)(4).) In contrast, such broad language is not within Health and Safety code section 11471, and subdivision (d) permits a warrantless seizures only if the property has been sued "in violation" of the Uniform Controlled Substances Act. Even if this court were to follow the Pace line and permit the

warrantless seizure of property subject to forfeiture, the seizure must still be authorized by the forfeiture statute. The People contend that Pace permits the warrantless seizure even if the statutory scheme has been violated, but there is nothing in the case which supports this interpretation.

Second, contrary to the People's position, the Ninth Circuit is not alone in requiring forfeiture seizures to comply with the warrant requirement. The facts of the instant case fail to present any exigency justifying the seizure of the Astro van. The vehicle had been parked in front of the residence; the officers knew the identity of the vehicle's owner; it left the residence and traveled down residential streets; it was not headed down the highway into oblivion. The prosecution stipulated that there was no other basis for the seizure other than forfeiture. The Astro van was improperly seized and the fruits of the subsequent

inventory search were properly suppressed. (See People v. Steeley (1989) 210 Cal.App.3d 887, 891-892.)

DISPOSITION

The judgment is affirmed.

Harris, J.

WE CONCUR:

Martin, Acting P.J.
Stone (W.A.), J.

Court of Appeal
Fifth Appellate District
Filed
Sep 28 1995

Kevin A. Swanson, Clerk

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

THE PEOPLE, NO. F021529

Plaintiff and Appellant,

v. MODIFICATION OF OPINION ON DENIAL OF REHEARING

BRET CRAIG BINDA,

Defendant and Respondent

The typewritten opinion filed in the above entitled action on September 28, 1995, is modified as follows[1/]:

1. On page 4 [Appendix p. 6, ln. 17], the last two sentences beginning on line 12 of the first paragraph, are deleted, and in its place the last sentence is modified to read: Respondent was charged with possession and transportation of methamphetamine

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1. Page and line references to this Appendix are listed in brackets.

based on the narcotics found during the inventory search of the van after it was seized for asset forfeiture."

2. On page 6 [Appendix p. 10, ln. 7], the second sentence of the first full paragraph is modified to read: "The People contend the asset forfeiture statute justifies the warrantless seizure of the van because the officer had probable cause to believe the van had been purchased with narcotics proceeds."

3. On page 9 [Appendix p. 15, ln. 11], starting at line 5, the third sentence is modified to read: "Thus, the only basis for a civil forfeiture proceeding would have been pursuant to the clause in section 11470, subdivision (f) providing for forfeiture when property is 'traceable' to narcotics sales."

4. On page 9 [Appendix p. 15, ln. 18], starting at line 11, the sentence is modified to read: "Thus, while Officer Reid may have had probable cause to believe

respondent's van was purchased with proceeds traceable to narcotics transactions, such a belief would justify the initiation of civil forfeiture proceedings; it did not permit the warrantless seizure of respondent's van under section 11471, subdivision (d) because Reid did not have probable cause to believe the van had been used 'in violation' of the act."

These modifications do not effect a change in the judgment of this court.

Appellant's petition for rehearing is denied.

Dated: Oct 25 1995

Harris, J.

WE CONCUR:

Martin, Acting P.J.
Stone (W.A.), J.

Court of Appeal
Fifth Appellate District
Filed
Oct 25 1995
Kevin A. Swanson, Clerk

Fifth Appellate District No. F021529
S049922

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Appellant

v.

BRET CRAIG BINDA, Respondent.

Appellant's petition for review denied.

LUCAS, Chief Justice

SUPREME COURT
FILED
DEC 21 1995

Robert Wandruff Clerk

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATE OF CALIFORNIA

HEALTH AND SAFETY CODE SECTION 11470, SUBDIVISION (f)

The text of subdivision (f) of section 11470 of the California Health and Safety Code is as follows:

"The following are subject to forfeiture:

". . . . . .

"(f) All . . . things of value furnished by any person in exchange for a controlled substance, [or] all proceeds traceable to such an exchange . . . if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first."

STATE OF CALIFORNIA

HEALTH AND SAFETY CODE SECTION 11470

California Health and Safety Code section 11471 provides as follows:

> "Property subject to forfeiture under this division may be seized by any peace officer upon process issued by any court having jurisdiction over the property. Seizure without process may be made if any of the following situations exist:
>
> "(a) The seizure is incident to an arrest or a search under a search warrant.
>
> "(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this division.
>
> "(c) There is probable cause to believe that the property is directly or indirectly dangerous to healthy or safety.
>
> "(d) There is probable cause to believe that the property was used or is intended to be used in violation of this division."

The "division" reference in subdivision (d) is to sections 11000-11651 of the Health and Safety Code, the California Uniform Substances Act. (See Health

and Saf. Code, § 11000.) In general, these are the basic provisions prohibiting possession, manufacture, sale, etc. of narcotics and controlled substances.